Filed 2/5/18 P. v. Wallace CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SIDNEY EDWARD WALLACE, Defendant and Appellant.	C082750 (Super. Ct. No. 15F07322)

Defendant Sidney Edward Wallace was convicted of multiple charges related to a domestic violence incident, including carjacking. (Pen. Code, § 215, subd. (a).)[1] On appeal, he contends the trial court's carjacking instructions were inadequate. He also challenges his felony conviction under Vehicle Code section 10851, arguing the People

---

[1] Undesignated statutory references are to the Penal Code.

failed to establish his crime was a felony pursuant to Proposition 47 and section 490.2. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Since November 2009, defendant and Jessica G. had been in an on-again, off-again relationship. They lived together for four years and have two girls together, ages three and two at the time of trial. They disagreed "a lot of the time," including over parenting their children, money, and defendant's lack of employment. In addition, only Jessica had a car, and they argued over sharing it. Their arguments would turn physical. Defendant could "get really angry. And once he's angry, it's sometimes no [*sic*] calming him down."

Defendant and Jessica separated in March 2015, although they remained in touch due to the children. They had an informal custody arrangement, where the children lived with Jessica and visited with defendant. Defendant felt he did not see the children enough. After they split up, Jessica stopped allowing defendant to drive her car.

At approximately 2:20 p.m. on December 3, 2015, Jessica was leaving work and walking to her car when she saw defendant sitting on a bench by her workplace. As she approached her car, defendant ran toward her and asked why she was trying to keep the children away. Defendant told her to get in the car. Afraid, Jessica refused and started to back away, but defendant grabbed her by the wrist and pulled her toward the car. Jessica yelled for defendant to stop and screamed for help. They started "tussling" (i.e., pushing and shoving) and ended up about two or three parking lot rows away from her car. Defendant put his hands around her neck. Eventually, Jessica "just gave up" and defendant "snatched" her keys. Jessica testified defendant took the keys by force. She also testified that, although she was afraid defendant would hurt her during the altercation, she was not fearful at the moment he took the keys and somewhat expected him to do so. Defendant then drove away in Jessica's car, and Jessica returned inside the building and called the police.

After defendant left Jessica's workplace, he picked up the children at their day care. Defendant then drove approximately 10 minutes to his mother's home, which was down the street from Jessica's work. Police found the car, defendant, and the children there. The children were eating and watching television when Jessica arrived to retrieve them and the car approximately 90 minutes after the incident. Jessica testified the car was undamaged. Defendant later stated during a recorded jail phone call that he had only driven the car for less than 30 minutes. Defendant later told Jessica that he had wanted to take her to lunch that day and have sex with her.

Several of Jessica's coworkers testified at trial regarding the incident. One coworker said he was working on the second floor when he saw defendant unsuccessfully pulling Jessica toward the car and heard Jessica screaming for help, sounding as though she was in distress. Another coworker was in the parking lot and heard Jessica "screaming hysterically" as defendant was holding his hand on her throat. According to the coworker, defendant held Jessica by the throat, said, "[C]ome on. Stop me. Get in the car. Let's go," and "snatched" Jessica's keys, taking them "by force."

During the May 2016 trial, Jessica testified about previous incidents of domestic violence with defendant. According to Jessica, defendant had tried to strangle her on two prior occasions. In addition, in May 2013, defendant and Jessica began arguing while they were in the car. Jessica became upset when defendant broke her phone, so she exited the car. Defendant followed and grabbed Jessica by the back of her shirt, preventing her from leaving. The police were called.

In October 2014, defendant showed up at Jessica's work and they began arguing about money. Defendant tried to pull her back to the car, and they started "tussling." They ended up inside the building, and the security guard broke up the fight.

In October 2015, defendant unexpectedly arrived at a park where Jessica was watching her son (who is not defendant's child) play football. Defendant began to play with their girls, who were also there. When Jessica approached, defendant "snatched"

her keys out of her hand. Defendant prevented Jessica from retrieving the keys by pushing her face away and placing his hands on her neck. Eventually, defendant let go and went to the car. Bystanders prevented defendant from driving off, with one of the men hitting defendant and a coach retrieving Jessica's keys. The police arrived and took Jessica's statement. Jessica subsequently asked defendant to stop his behavior, but defendant responded he "want[ed] to see [his] girls." Jessica testified she was not trying to keep the children from defendant, but she was not always able to bring them to visit when defendant wanted.

With respect to the carjacking charge, the jury was instructed pursuant to CALCRIM No. 1650: "To prove the defendant is guilty of [carjacking], the People must prove that one, defendant took a motor vehicle that was not his own. Two, the vehicle was taken from the immediate presence of a person who possessed the vehicle. Three, the vehicle was taken against that person's will. Four, the defendant used force or fear to take that vehicle or to prevent that person from resisting. And, five, when the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle, either temporarily or permanently. [¶] [T]he . . . defendant's intent to take the vehicle must have been formed before or during the time he used the force or fear. If the defendant did not form the required intent until after using the force or fear, then he did not commit carjacking. [¶] The person takes something when he gains possession of it and moves it some distance. The distance moved may be short. [¶] Fear, as used here, means fear of injury to the person herself. [¶] A person does not actually have to hold or touch something to possess it. It is enough if the person has the right to control it. [¶] A vehicle is within a person's immediate presence if it is sufficiently within her control, so that she could keep possession of the vehicle if not prevented by force or fear."

The trial court refused defense counsel's request to add the following pinpoint instruction, based on *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved

on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, footnotes 2 and 3: "the force required for the carjacking must be more than incidental touching necessary to take the property."

During deliberation, the jurors asked the following question with respect to the fourth element of the carjacking charge, i.e., whether defendant used force or fear to take the vehicle or to prevent that person from resisting: "We would like a definition or clarification of what force means here." Defense counsel again requested the trial court give his proposed pinpoint instruction or a definition as stated in *People v. Wright* (1996) 52 Cal.App.4th 203, 210: "When *actual* force is present in a robbery, at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim." The trial court refused, reiterating it had already denied that request and stating it would instruct the jury to use an "ordinary and everyday meaning" of force, since the definition of force was "within the common layman's understanding of those terms." The trial court informed counsel that, if that did not "resolve the issue, we'll bring them in and talk to them and see whether further dictionary definitions might be of assistance to them."

On May 19, 2016, the jury convicted defendant of carjacking (§ 215, subd. (a); count two), misdemeanor battery against the mother of his child (§ 243, subd. (e)(1); count three), and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count four). On July 22, 2016, the trial court sentenced defendant as follows: five years in state prison for count two; one year in county jail for count three; and two years for count four, stayed pursuant to section 654. The trial court suspended execution of the sentence and ordered five years' probation. Defendant filed a timely appeal.

DISCUSSION

I

Defendant contends the trial court erred in refusing his pinpoint instruction. The People argue the pinpoint was unnecessary because the term "force" is not a concept that requires definition. We agree.

A defendant has a " 'right to have the jury determine every material issue presented by the evidence.' " (*People v. Flood* (1998) 18 Cal.4th 470, 480.) " '[I]n appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) Still, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

As courts have explained, "section 215, subdivision (a) does not define the degree of force required to support a conviction for carjacking and the standard instruction on carjacking (CALCRIM No. 1650) does not define the force requirement." (*People v. Hudson* (2017) 11 Cal.App.5th 831, 836.) Because the crime of carjacking is modeled on the robbery statute, we "look to interpretations of the force requirement in the robbery context in construing the requirement in the carjacking context." (*Id.* at p. 835.) Although robbery "require[s] that the perpetrator exert some quantum of force in excess of that 'necessary to accomplish the mere seizing of the property,' " (*People v. Anderson* (2011) 51 Cal.4th 989, 995), the force element of robbery has no technical meaning and is presumed to be understood by jurors (see, e.g., *People v. Anderson* (1966) 64 Cal.2d 633, 640; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 544). Because CALCRIM No. 1650 was plain and adequate, there was no error in denying a duplicative and potentially confusing pinpoint instruction. (See *People v. Garceau* (1993) 6 Cal.4th 140, 189, disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Even if the trial court erred, it was not reasonably probable a result more favorable to defendant would have been reached had the pinpoint instruction been given. (See *People v. Flood, supra,* 18 Cal.4th at p. 490 [a trial court's erroneous failure to give a pinpoint instruction is reviewed for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836-837]; see also *People v. Earp* (1999) 20 Cal.4th 826, 887 [same].) Despite defendant's attempts to characterize his behavior as merely snatching the keys, Jessica testified defendant took the keys "by force and by fear and against [her] will." Moreover, prior to taking the keys, defendant grabbed Jessica by the wrist, pulled her toward the car, pushed her, shoved her, put his hands around her neck, and refused her repeated requests to stop. As Jessica testified, she "just gave up" by the time defendant took the keys. Any error was harmless.

II

Proposition 47, which became effective November 5, 2014,[2] "makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) As relevant to this case, Proposition 47 added section 490.2: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).)

Vehicle Code section 10851 proscribes theft and nontheft activity: "Vehicle Code section 10851 punishes not only taking a vehicle, but also driving it without the owner's consent, and 'with intent *either* to *permanently* or *temporarily* deprive the owner thereof

---

[2] *People v. Valencia* (2017) 3 Cal.5th 347, 368.

of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*.' [Citation.]" (*People v. Page* (2017) 3 Cal.5th 1175, 1182 (*Page*), original italics.) To be guilty of the theft form of Vehicle Code section 10851, the defendant must have the "intent to permanently deprive the owner of its possession." (*Ibid*.) While this appeal was pending, our Supreme Court held that section 490.2 "covers the theft form of the Vehicle Code section 10851 offense." (*Page, supra*, at p. 1183.) In other words, " 'after the passage of Proposition 47, an offender who obtains a car valued at less than $950 by theft must be charged with petty theft and may not be charged as a felon under any other criminal provision.' " (*Page, supra*, at p. 1183, italics omitted.)

Defendant contends there was no evidence the vehicle was worth more than $950. In addition, during oral argument, defendant argued the trial court erred in convicting him of a felony under Vehicle Code section 10851 because the jury did not determine whether he unlawfully took Jessica's vehicle by theft. The People argue defendant forfeited the issue by failing to raise it in the trial court. In the alternative, the People contend any error was harmless.

The jury was instructed regarding Vehicle Code section 10851 per CALJIC No. 1820 as follows: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A *taking* requires that the vehicle be moved for any distance, no matter how small." (Original italics.) Under this instruction, then, the jury could have found defendant committed the theft or nontheft form of Vehicle Code section 10851. Even though Proposition 47 and section 490.2 had been in effect for over 18 months as of the May 2016 trial, defense counsel informed the court he had no "comment or objection" to the instruction. Because defendant failed to request the court to modify the instructions to clarify the basis of the jury's guilty finding, he has forfeited the issue of whether the jury found that he

committed the theft or nontheft form of Vehicle Code section 10851. (See *People v. Lang* (1989) 49 Cal.3d 991, 1024 ["A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"], abrogated on other grounds, *People v. Diaz* (2015) 60 Cal.4th 1176.)

Regardless, any error was harmless because no reasonable juror would have found defendant guilty of a misdemeanor pursuant to Proposition 47, Vehicle Code section 10851, and section 490.2. Even assuming the evidence showed and the jury found the value of Jessica's car did not exceed $950, the record establishes defendant did not intend to permanently deprive Jessica of possession. After taking Jessica's keys, defendant drove to the children's day care, picked up the children, and then returned to his mother's house, which was "down the street" from Jessica's workplace. In all, defendant drove the car for less than 30 minutes. Jessica was able to retrieve her car within approximately 90 minutes of the incident, and it was in the same condition. The temporary taking and subsequent abandonment of a vehicle constitutes an unlawful taking of a vehicle under Vehicle Code section 10851, but it does not constitute theft. Accordingly, it is not reasonably probable the jury would have found defendant committed theft of a vehicle within the meaning of Vehicle Code section 10851.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.*

We concur:

HOCH, Acting P. J.

RENNER, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.